

BRUCE KEITHLY, DONOVAN LEE,
EDITH ANNA CRAMER, and MATTHEW
BEBBINGTON, individually and on
behalf of all others similarly
situated,

Interim Lead Plaintiffs,
v.

INTELIUS, INC., A Delaware
Corporation; and INTELIUS SALES,
LLC, a Nevada Limited Liability
Company,

Defendants,
v.

ADAPTIVE MARKETING, LLC, a
Delaware Limited Liability Company,

Third Party Defendant,

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT S. LASNIK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: VICTORIA S. NUGENT

For the Defendant: ARTHUR W. HARRIGAN

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February 3, 2011

9:00 a.m.

PROCEEDINGS

THE CLERK: C09-1485L, Bruce Keithly, et al. v. Intelius, Inc., et al. Counsel, please make your appearances for the record.

MS. NUGENT: For plaintiffs, Your Honor, Victoria Nugent, and I'm joined today by my colleague, Karin Swope, and our client, Bruce Keithly.

THE COURT: Okay. Thank you. And the next row?

MR. GRIFFIN: Mark Griffin of Keller Rohrbach.

MS. CASE: Whitney Case, Keller Rohrbach.

THE COURT: Thank you.

MR. HARRIGAN: Good morning. Arthur Harrigan representing Intelius. I'm here with my partner, Tyler Farmer, and Mr. Bill Beaver, Intelius' general counsel.

THE COURT: We are here on Intelius's motion to dismiss. I know we have a separate motion about judicial notice and the like. I don't really want to hear a lot of argument on the judicial notice thing. I'm going to consider the screen shots that were submitted for purposes of the motion here today. I know they're disputed, generally, by plaintiff, although plaintiff hasn't presented any contrary versions of it, as has happened in some cases. But suffice it to say, for moving-forward purposes, I'm going to consider this case from the perspective of what Intelius has submitted

1 was in effect at that time.

2 So, Mr. Harrigan?

3 MR. HARRIGAN: Thank you, Your Honor. Your Honor,
4 I'd like to start with -- go in chronological order,
5 essentially, and start with the Adaptive ad of June 19th,
6 2008. And with the sort of opening point that an ad that
7 was -- two ads that were less clear than the one at issue in
8 this case, which I'll show you, demonstrate in a second, have
9 been approved by three courts in two cases as unequivocally
10 not misleading, and the court knows what those cases are.

11 In the *VistaPrint* case, which is the first one, there was
12 another element in common with this case, which is that the
13 complaint tended to be stated in conclusory terms, as opposed
14 to laying out the specific elements that were deemed to be
15 deceiving. The court noted that that was not appropriate and
16 that the allegations are, quote, clearly and unequivocally
17 refuted by the website pages themselves, unquote.

18 In the *Baxter* case, the district court, similarly, found
19 the result to be clear and unequivocal, and that was
20 affirmed -- and the *VistaPrint* case was affirmed in the Fifth
21 Circuit.

22 I think another important point about this area of the law
23 is that the standard for what is deceptive is an objective
24 standard. And I quote, in support of that proposition, the
25 plaintiffs, who say in their brief, quote, The purpose of the

1 capacity-to-deceive test is to deter deceptive conduct before
2 injury occurs, unquote. Quoting the Washington Supreme Court
3 in the *Indoor Billboard* case, ends when plaintiffs further
4 say, "Moreover, the question of whether a representation is
5 deceptive is answered objectively from the perspective of a
6 reasonable consumer, and not subjective."

7 So, basically, Your Honor, as the courts did in the other
8 two cases, you look at the ad, and you figure out whether
9 it's, in fact, deceptive or not.

10 THE COURT: But, Mr. Harrigan, my problem with the
11 two cases, particular the Northern District of California
12 case and the Texas case, is, it looks at the language as if
13 it was a contract staring you in the face, that you have time
14 to read, that you're looking over, or you would say, I don't
15 want to read it. I'm just going to sign. And in those
16 situations, you either should have read it, or you didn't
17 read it and you -- if you had questions about it, you should
18 have answered them. But what's missing in both those
19 district judges' decisions, respectfully to my colleagues in
20 other parts of the country, is the dynamic and the context of
21 seeing these things while you think you're buying something
22 else and working your way through online marketing.

23 And online marketing has a culture all its own that says
24 at some point I'm going to get to an end point here, and I'm
25 going to have a confirmation of what I bought, how much it

1 cost, and what the details are, and if I want to print it, I
2 can print it. And what Adaptive and what Intelius do here is
3 put things in manners that are not easy to detect when you're
4 following a certain path that you're used to.

5 And so rather than just throw those two cases at me, let's
6 analyze it from the perspective from an online consumer, who
7 is working his way through screen shot after screen shot
8 after screen shot, and see whether the process is
9 straightforward and fair, or whether it's designed to get
10 people into situations where they're buying something they
11 don't want, they don't need, and they don't use.

12 MR. HARRIGAN: Your Honor, I agree that that is an
13 issue. The cases, I think, actually do shed some light on
14 that, but we don't get to argue about that.

15 We handed up a notebook that lays out the facts, which is
16 essentially the screen shots, starting with the ad in the --
17 in the June ad in the Adaptive part of this case. And the
18 way that this works in the notebook, Your Honor, I hope, is,
19 we've given you a little typed-up sheet here with numbers and
20 letters on it. And if you open the notebook, you will see
21 the ad that was discussed by Judge Guilford in the California
22 *Baxter* case, and under that, or opposite that, is the
23 Intelius ad. And part of the purpose of this is to show that
24 the Intelius version of the Adaptive ad is clearer than the
25 one that Judge Guilford ruled on, but it will also address

1 the questions the court just raised.

2 So by quick explanation, on the little sheet that is
3 attached, there are numbered paragraphs and lettered
4 paragraphs that correspond to the numbers and letters. On
5 the second page here, which is the Intelius version of the
6 Adaptive ad, the letters are the areas in which this one is
7 clearer, we believe, than the one that Judge Guilford held
8 was crystal clear.

9 But let's start at the top, because the claim -- one of
10 the issues the court just mentioned is similar to the claim
11 that Judge Guilford addressed first in his opinion, which was
12 that the offer was deceptive because it was not clearly a new
13 transaction, which, I think, is part of the issue here, which
14 is, when you get to this page after you have purchased your
15 report from Intelius, are you made aware that you are now
16 being made a different and new offer? Because if you are,
17 then, obviously, you're going to read and see what that offer
18 is before you accept it.

19 So the question really is, when you get to this page, what
20 is likely -- what is a reasonable consumer likely to do? And
21 Judge Guilford said that the, "Thank you. Your order has
22 been successfully completed," that statement at the top, is
23 clear and unambiguous and tells you that that part is over
24 and now you're on to something else. He also noted that
25 there are two possible responses offered, and one is, "Yes,

1 show me my report," and, "No, and show me my report," which
2 also, he said, indicated there was a new transaction in the
3 offering.

4 THE COURT: Isn't the graphic display of, "Yes, and
5 show me my report," quite different than the, "No, and show
6 me my report," in terms of color, in terms of shade, in terms
7 of font?

8 MR. HARRIGAN: It's different; however, one of the
9 points of difference between these two ads is, even though
10 Judge Guilford found that at this part of the Adaptive ad,
11 even at before it was clear, if you look down by letter A,
12 you'll see that the Intelius version, the wording is larger
13 and there is a box around the "No, and show me my report"
14 that was not present in the other case.

15 The other question is, are you being made -- I think the
16 other key thing here, which the two have in common, is that
17 before you can click on the "yes" button, you have to put
18 your email address in here twice. So this is not a situation
19 where someone can just glance at this page, hit "yes," and
20 move on to the next page and acquire something. They have to
21 actually spend at least enough time to see, oh, I have to put
22 my email address in; oh, I've got to type it in again. You
23 can't just copy it. You have to type it in again. And it
24 appears to me, at any rate, that that step would suggest,
25 again, that not only is there a new transaction, but it

1 forces the user to slow down and see what's going on here.

2 So what is the consumer told about what is going on here?
3 Well, if they look at the top of the request for the email
4 address, right under, "Please type your email address," it
5 tells you that you're going to have your credit card
6 information sent to another entity.

7 THE COURT: It tells me that if I take off my glasses
8 and get very close to the computer screen.

9 But what is this Family Safety Report anyhow? What is
10 this Community Safety Survey? What is this all about?
11 Mr. Harrigan, my *Cyberspace* case, you know, people send
12 checks to companies, and on the back, it says, "By endorsing
13 this check, you agree to have us bill your telephone
14 \$19.95" -- I forget -- "\$39.95 for Internet service." And,
15 yes, it said very clearly what was going on. But it's put in
16 a place where people are not expecting it. It's sent to
17 businesses that are routinely just cashing their checks. And
18 then people look at their bills five or six months later and
19 realize they've been charged 500 bucks or 600 bucks for
20 something they never used. Isn't that pretty strong evidence
21 that people have been deceived into getting something they
22 didn't want? They never used it.

23 MR. HARRIGAN: Well, Your Honor, that was the case in
24 that particular instance. I read that case, and, you know,
25 first of all, people were absolutely misled into believing

1 that this was a routine part of some previous transaction
2 where they were going to get a refund in a small amount and
3 not bothering looking at it. And there was no purchase
4 transaction taking place at the time at all. It was simply
5 something they got in the mail that looked like it wasn't
6 worth bothering about and move on to the next thing.

7 And, you know, Your Honor, I don't know that that case
8 would have been a lot different if the statements had been on
9 the front or if it had said, you know, put in your email
10 address here twice before you endorse this check, but I think
11 it might have been different.

12 THE COURT: I'm sure the people who were pulling
13 those scams then are doing those scams on the Internet now.

14 We're talking about context, and my problem that I have
15 with the Texas case, especially, is there was no analysis of
16 context.

17 And what about the fact that the Attorney General of the
18 State of Washington has moved on this because they've had so
19 many complaints about it? Doesn't that tell us that there
20 are a number of people out there who are being misled and
21 deceived by this structure?

22 MR. HARRIGAN: Your Honor, I think if you read what
23 the Attorney General has said about the complaints, the
24 statement, at least, that's in the brief, is a generic
25 statement about interstitial ads and the problems that they

1 can lead to, and they reference hundreds of complaints.

2 And I think, for example, if you compare it to your case
3 with the check writing, there were two things about that that
4 I think are important: One is, the court -- the Ninth
5 Circuit said that the information about people who were being
6 misled, quote, bolsters, unquote, the conclusion that this is
7 deceptive, because the deception has to be objectively
8 determinable by the retailer before they put the ad out,
9 because they're going to violate the Consumer Protection Act
10 the minute they put it out there. And I think context or no
11 context, we have literally two courts saying this isn't just
12 clear, it's unequivocally clear, and how, you know -- how is
13 a retailer, under an objective standard, supposed to do
14 better than that?

15 THE COURT: Well, let's talk about that. Let's say
16 don't put your email address, put you credit card in or put
17 your debit card in. How about giving us some place where the
18 800 number to cancel is available rather than one step in a
19 ten-step process that, if you don't think to print the page,
20 you never see the 800 number again? How about telling the
21 person that this is not an Intelius product but it is an
22 Adaptive product? How about telling the person that if they
23 have a problem, they can't call Intelius because they won't
24 respond it to? How about telling the people that a huge
25 amount of Intelius' profit comes from this, and that they're

1 getting a tremendous kickback from Adaptive every time they
2 sell one of those things? How about telling the consumer
3 those things, and then letting the consumer decide if they
4 really want this or if they really need this? That's what
5 I'm looking at.

6 MR. HARRIGAN: Well, I think if you look down at this
7 page, the 1-800 number is set out where the number "5"
8 appears and the letter "E" appears. Because here, in this
9 ad, Intelius has said, call our toll-free number, and the
10 toll-free number is right there in the -- in other words, it
11 tells the person exactly how to cancel it.

12 THE COURT: Right. But, again, this is one screen
13 shot, and this is where I think the district judges went awry
14 in their analysis in the other cases, is, yeah, if you stare
15 at this page long enough, you'll see everything you need to
16 know. But that's not how people interact with their
17 computers when they're getting to the bottom line of, okay,
18 check here, continue here, continue there, confirm there,
19 boom, I'm done.

20 There is a protocol of buying things on the Internet that
21 people get used to. And when a company deviates from that
22 protocol, and, yes, they have everything they need to have
23 there, I don't dispute that, but they're not displaying it in
24 a manner, at least arguably, that allows a consumer to
25 understand what they're getting into. That is what's missing

1 in the analysis of the Texas case and the North District
2 case. Is the language there? Yes, it is.

3 Is a consumer held to what he should have read? Yes, he
4 is. But you have to look at the context and say, obviously,
5 if the font was so small you couldn't read it, that would be
6 a reason to say, well, maybe it was deceptive in this case.
7 If the screen flashed at you for five seconds and then moved
8 on to something else, well, that would be a reason to look at
9 it.

10 Their argument is, the way this was displayed, in multiple
11 screen shots, might have given all the information that a
12 consumer needed, but it displayed it in a way that was
13 intended that the consumer not focus on it and make them
14 think they were just moving on to the next phase of buying
15 the very thing they set out purchasing in the beginning.

16 MR. HARRIGAN: Your Honor, it seems to me that when
17 you're talking about the sequence of screen shots here, what
18 has preceded this is the wrapping up of ordering the report
19 that the individual originally decided to purchase from
20 Intelius.

21 They're told right off the bat that your order has been
22 completed. Then they're invited to move on to the next step
23 for the \$10 cash back. Then -- I mean, the court mentioned a
24 few items: One is, what is this Family Safety Report? Well,
25 unlike the *Baxter* case where it's kind of buried under a

1 bunch wordage, in the Intelius Adaptive ad, there are three
2 bullet points that tell you what this is, and it's obviously
3 not the thing you just bought. I mean, all you have to do is
4 just -- "Family Safety Report. Protect your family now," has
5 nothing to do with buying a report on an individual -- you
6 know, finding out whether George Smith lives in Everett,
7 Washington, or not.

8 So you know from letter C, when you see the offer of a
9 Family Safety Report, you want to look down and see it's a
10 totally different product from what you just did. Then
11 before you can buy it, you have to put your email address in
12 twice.

13 And, again, unlike the California case, in this case there
14 is a little parenthetical, which is a very common thing for
15 people to see on the Internet, "This is a secured page,"
16 which alerts you that there is a credit card transaction
17 involved on this page. And if you were in any doubt, you're
18 told twice above and below the email address that your credit
19 card information -- or below the email address that your
20 credit card information is going to be transferred.

21 And if you -- and the -- again, in this ad, under "D," the
22 offer details are set out in a clear heading that show --
23 that tell you this is an offer, the details are down below.
24 And as I said, the ability to cancel is tied directly back to
25 the 800 number that's provided there.

1 So on that basis, Your Honor -- and, Your Honor, this is
2 basically -- this is the page. It's like not like there are
3 four of them. You get done buying your report, and then you
4 are presented with this. And the question is, I believe, can
5 someone, a reasonable consumer who takes the time to put
6 their email address in twice, miss the fact that this is a
7 new transaction?

8 And, you know, Your Honor, the other thing that I want to
9 get back to answering, to address your earlier question: In
10 the *Cyberspace* case, there was absolutely clear evidence of
11 deception because 225,000 people signed -- you know, endorsed
12 this check, and not -- and one percent of them actually used
13 the Internet service, so clearly they had no idea what they
14 were doing.

15 Here what we have is the Attorney General saying,
16 essentially, these interstitial ads have led to hundreds of
17 complaints. Well, that's the numerator. What's the
18 denominator? We're talking about millions of people who have
19 the opportunity to do this, and very few do, and the question
20 is, how many of those were actually deceived? And there's no
21 allegation about that, much less evidence about that, in this
22 case, such as there was in your case.

23 THE COURT: But the Consumer Protection Act and case
24 law is not just designed to protect the sophisticated person,
25 it's designed to protect the unsophisticated consumer. I

1 think you'd agree with me on case law.

2 MR. HARRIGAN: Right, a reasonable, unsophisticated
3 consumer.

4 And, again, Your Honor, I think, you know, the -- if there
5 were allegations of actual percentages of deception in this
6 case, they could be corroborative, but only corroborative of
7 a previous finding that, objectively, these ads are
8 misleading.

9 And I do think that regardless of -- I mean, granted, this
10 court is looking at this, perhaps, in a different context
11 from the other courts. But the fact is, what is a retailer,
12 who is putting one of these ads on its site, supposed to do
13 to conclude differently from two courts that have said not
14 only is it not deceptive, it's not even close to being
15 deceptive?

16 Your Honor, I don't know how much time I have.

17 THE COURT: You have as much time as you want.

18 MR. HARRIGAN: Okay. So I think that, given what the
19 court's approach is here, I think, you know, we need to look
20 at this ad, and it is the one and only page that really is
21 involved here, except for the fact that we -- obviously, what
22 happened just before this is that you obtained a report, and
23 the -- there are no other pages to the flow, so basically
24 where we are is analyzing this page to see whether it's
25 deceptive.

1 I guess my bottom line is that, particularly in light of
2 the requirement for two email addresses, it's reasonable that
3 a consumer is going to look at some part of this and figure
4 out that it's a different product, and at that point they
5 should be on notice that they read it before -- read
6 something before they proceed further.

7 And you can't -- you really can't read much of anything on
8 this page without figuring out that you are being invited to
9 do something different, and, quote, and involving a transfer
10 of credit card information.

11 But I'd like now to turn to the second part of this case,
12 which has to do with Intelius' own products and the
13 identity -- there are two Identity Protect offers, and
14 they're also in this notebook, and there's another little
15 write-up that I prepared to kind of lead us through it.

16 And so the first one is the August of 2010 purchase by
17 Mr. Keithly. First of all, Your Honor, the Identity Protect
18 product is not a post-transaction. These two Identity
19 Protect products are not post-transaction products. This is
20 a garden variety. If you buy two things, you get a break on
21 the price of one, and it's happening at the same time as the
22 purchase. And the question is, if you're going to get the
23 discounted version by signing up for Identity Protect, or
24 you're going to pay full price and not sign up for Identity
25 Protect.

1 And I think the court mentioned some things that might
2 have been better about the Adaptive ad, and I think that
3 most, if not all of those things, are present in this ad.

4 And the fact is, although it's not part of this motion,
5 but the fact is that Intelius went to great pains to try to
6 figure out how to make this stuff clear.

7 The first two pages of Tab B are simply the beginning
8 process of getting a background report from Intelius, a
9 normal Intelius product. The first time that the question of
10 Identity Protect comes up is called Step 3, and it very
11 simply says that you can either pay \$49.95 or \$39.95,
12 depending on whether you want Identity Protect. At that
13 point, it doesn't tell you what Identity Protect is. It just
14 tells you that something called Identity Protect gives you
15 \$10 off.

16 But I think the important thing about this, Your Honor, is
17 simply that it slows you down and it tells you, okay, which
18 one of these do I want to pay for? I guess you could just
19 blindly click on one if you didn't care. Most people are
20 going to decide whether they, at least, want to consider
21 this.

22 So you click on "Add to Cart," but the fact is -- you
23 click on the "Add to Cart" under "\$39.95," you're not buying
24 anything. Then you go to the next page, and you're told what
25 you got for the \$39.95.

1 Now, if you had said \$49.95, you could see a different
2 page that just completed your transaction. So now you're
3 told, okay, this is background report with Identity Protect,
4 under No. 2 there, and it tells you again about the \$10 off.

5 Then under No. 3 here, you see that the person is
6 basically reminded -- or told that they can remove Identity
7 Protect; in other words, they've gone down one fork, but all
8 they have to say is "remove," they're back to the fork again,
9 and they can go down the \$49.95 path, or they can continue
10 and they go on to the next page.

11 Okay. What are they told about Identity Protect? Well,
12 if you were thinking about this at all, you could hardly
13 miss, "Identity Protect benefits," which has the No. 4
14 pointing at it, and it lists the things that you might want.

15 And, Your Honor, lots of people buy Identity Protect for
16 perfectly good reasons. They get a \$25,000 insurance policy,
17 they get 10 percent off future Intelius purchases, and so
18 forth, and that's all laid out very clearly on this page.

19 There are two places on the page where they are told --
20 and those are Nos. 5 and 7 -- that if they sign up for
21 Identity Protect, they're going to be billed monthly \$19.95,
22 and each month thereafter, No. 7.

23 Under No. 6, they're reminded again that they're getting a
24 discount because of Identity Protect, and they save ten
25 bucks.

1 So if they hit, "Remove Identity Protect," they go back to
2 the \$49.95 Identity Protect; if they say, "Continue," they
3 get to the next page.

4 And this is now Step No. 5. They are further reminded
5 that they're getting a discounted price because of Identity
6 Protect, and if they see that and they have any doubts, they
7 can click back to the previous page and see what that is.

8 And then in Step No. 6 -- and by the way, Your Honor, so
9 far, Your Honor, no one has bought anything. So all the way
10 through this, at any point in time, even after you -- you
11 could have clicked, "Remove Identity Protect," you can always
12 just stop and nothing has happened, or you can go back and
13 check it out some more, if you want to.

14 On Step 6, they are again reminded of the fact that
15 they're getting a discount by signing up for Identity
16 Protect.

17 And then finally, on Step 7, they're once again reminded
18 of the discount, and they have to create an account, which
19 takes a while, to complete their transaction, which includes
20 both buying the original product at the discounted price and
21 signing up for Identity Protect.

22 And, Your Honor, I think that that flow is as clear as it
23 could be, and the only way that you can -- I mean, you have
24 to decide which price you're going to pay. And it's very
25 unlikely that someone decides on the lower price and

1 doesn't -- or has a question entering his mind, what am I
2 doing to get this lower price? And I think that question is
3 very clearly answered in these pages.

4 Now, we also have Tab C, which is the next iteration of
5 Identity Protect, and that is a few months later. On
6 November 1 of 2009, they offered Mr. Bebbington -- and the
7 differences here, if you look at the pages, are that Step 3,
8 the only real difference is that Mr. Bebbington was
9 interested in three things. So, I mean -- excuse me. We're
10 on to Step 3 here. Right. Each of these three products has
11 a potential for the discount by signing up for Identity
12 Protect, and that's the reason that there are three of them
13 here instead of one.

14 And then in Step 4, the difference is that, instead of two
15 places on this page telling the consumer that they're going
16 to be billed \$19.95 a month, there are three. So the No. 2
17 is pointing at the third one; the other two are just below
18 that box, "Your credit card will be billed \$19.95," and then
19 over on the left, under "Offer details," the membership fee
20 of \$19.95 a month will be charged by Intelius, et cetera. So
21 that's in three places here, whereas it was only in two
22 places on the earlier offer.

23 And then when we get to Step No. 5, and, basically, the
24 differences here in Steps 5, 6, and 7 are that each one of
25 those pages tell us, again, that they're going to be billed

1 \$19.95 a month, and that was added to this process between
2 the April date and the November date.

3 And finally, on Step No. 7, that's the point in this
4 process where you actually commit to buy; in other words, you
5 have to go through everything you've just looked at, and then
6 you have to reconfirm the purchase and "Show my report." And
7 there's a reference to the -- a charge for \$1.04 because --
8 that varies. When you filled out the information, Intelius
9 knows what state you're in, and, therefore, they calculate
10 the sales tax. So that's the reason for that.

11 But the bottom line is that you have to go through every
12 single one of these pages, each one of which reminds you of
13 the \$19.95 commitment that you're making.

14 Finally, on the last page, you commit to buying. At any
15 point along the way, you turn your computer off or you want
16 to go look at the news on the Internet instead, you haven't
17 bought anything.

18 So, Your Honor, we believe that the Intelius version of
19 the Adaptive ad is noticeably clearer than those considered
20 by the other two courts, and that -- that, in fact, the key
21 question, really, for a retailer, is, is what I'm putting out
22 there a violation of the Consumer Protection Act; i.e., is
23 someone going to be fooled by this? And if those two courts
24 said anybody who even looks at this is going to know that
25 they're entering into a new transaction and what the terms

1 are, it's clear, unequivocally so, that ought to be good
2 enough for a retailer to not be violating the Consumer
3 Protection Act.

4 Now, that doesn't mean that some regulator or legislature
5 can't come along and say, "If you're going to do these ads,
6 you've got to do the following things," and that may very
7 well happen. And, in fact, as you can see from the Identity
8 Protect ads, Intelius has been working to make these things
9 clearer and clearer, even though this is not a similar
10 problem because it is not an interstitial ad, it's a
11 discounted purchase going on at the same time.

12 But the fact is, there has been an empirical process
13 figuring out that, you know, we've got to make these things
14 clearer, and doing so, but that doesn't mean that the first
15 one out of the box violated the Consumer Protection Act.

16 And the fact is that, even between April and November, you
17 can see that there was an effort made to make sure,
18 absolutely sure, that anybody who signs up for Identity
19 Protect knows they're going to be charged \$19.95 a month by
20 saying it over and over, but that doesn't mean that saying it
21 twice was not good enough the first time through.

22 THE COURT: But it doesn't just say you will be
23 charged \$19.95. It says you can cancel at any time.

24 MR. HARRIGAN: That's correct.

25 THE COURT: Okay. Thanks.

1 Ms. Nugent, what about Mr. Harrigan's point that, whether
2 I agree or disagree with the district judges in California
3 and Texas, the company has been told that their material is
4 okay, that it doesn't deceive? Why can't they rely on that,
5 at least until some regulator or some legislature tells them
6 otherwise?

7 MS. NUGENT: Because, Your Honor, I mean, this would
8 vary from state to state, and it would depend on how the
9 consumer protection statutes are actually drawn. The
10 Washington Consumer Protection Statute is a liberally
11 construed remedial statute that is intended to protect the
12 consumers as they actually behave in the marketplace.

13 It's our contention that these ads are deceptive and that
14 the disclosures provided are simply insufficient to, first,
15 convey what it is that the consumers are getting themselves
16 into, but also to overcome very deeply rooted ideas that
17 consumers have about the way the Internet works and the way
18 that purchasing things on the Internet works.

19 And when you have that, and you alluded it to, people
20 understand that you go through a series of steps where you
21 are shown a shopping cart that you have populated yourself.
22 You're given an opportunity to put in your billing and your
23 shipping information. You're asked to review the whole
24 transaction and then approve it and submit it for an order.

25 And when people have an understanding that that is how you

1 buy something on the Internet, it doesn't work to simply
2 insert some other proxy and call it consent, like typing in
3 your email address. The disclosures that have been provided
4 simply aren't strong enough to overcome those understandings
5 that people have.

6 THE COURT: What about the Bebbington situation? It
7 seems like, as Mr. Harrigan said, they're not conceding that
8 the earlier versions were deficient. But by the time you get
9 to Bebbington's version, when they tell you over and over you
10 will be charged \$19.95 a month, you can cancel at any time,
11 isn't it more of a stretch to say that a person looking at
12 that doesn't realize what they're doing?

13 MS. NUGENT: Your Honor, I would agree they are
14 marginal improvements, but I would not agree that they're
15 sufficient to prevent this from being deceptive, and I'd just
16 like to sort of walk through my opinion on that.

17 THE COURT: Okay.

18 MS. NUGENT: I just want to make sure that I'm
19 looking at the correct exhibit, because they were just handed
20 to me a few minutes before this hearing. Was it Tab C?

21 MR. HARRIGAN: Bebbington is Tab C.

22 THE COURT: Great.

23 MS. NUGENT: If you look at Step 4 -- well, actually,
24 we can back up.

25 If you start at Step 3, where the different options are

1 presented, what the red arrow that is -- you know, that the
2 defendants have added to this graphic to highlight a
3 particular point, is that in each of these scenarios, the
4 word "free" appears. The Identity Protect trial is free. So
5 what a consumer would believe, looking at that, is that
6 simply for trying something and it's free and it won't cost
7 them anything, they're going to get a little bit of a
8 discount on the things that they actually want to buy. Free,
9 I think, is a difficult word to overcome.

10 If you flip to the next page, at Step 4, again, they have
11 that they're going to get a discount to continue. You know,
12 once you've decided to accept this free trial, all you need
13 to do is hit the brightest thing on the page, the "continue"
14 button.

15 Appearing below that, you have the "Remove Identity
16 Protect trial" button and pay regular price, and that's in a
17 less intense, less noticeable color and position.

18 If you go to the offer details, which is where somebody
19 would expect to find everything they need to know about this
20 offer they've accepted, the language here is ambiguous about
21 the nature of this negative option. And, again, negative
22 options are another thing where I think you have to overcome
23 consumer perception of what free trials are and how they get
24 involved in prescription services. For most people, when you
25 accept a free trial, it means you try a product, and if you

1 like it, you then take steps to subscribe to it on a regular
2 basis, not that you try it, forget about it, never use it at
3 all, and then learn a year later that you've been paying for
4 it all this time because they have your billing information.

5 So the way this is phrased under the offer details, it
6 says, "A membership fee of \$19.95 per month will be charged
7 by Intelius.com to the credit, debit card you use today with
8 Intelius.com after the seven-day trial." And that makes
9 sense in meaning that if you continue to use this, if you
10 intend to go forward, we will simply automatically debit or
11 use your credit card. That's the way we do business, and
12 that's the way you would pay for this.

13 I think that a customer looking at that page would
14 conclude at that point that they've read what they were
15 supposed to read about the offer, which is really a shame,
16 because the way this is formatted, a better explanation, and
17 one that really should be the explanation, not something in a
18 different font or up here on the far right-hand side in very
19 small print, and that is where Intelius actually discloses
20 the way this negative option works. It says, "After your
21 seven-day trial, if you do not cancel your Identity Protect
22 membership, your credit card will be billed." But that's
23 really varied, and I don't think that most people would be
24 looking at that.

25 In some of the guidance that we submitted to the court, it

1 talks about how people use the Internet and what it is that
2 they're looking for. The FTC said that people scan pages in
3 an F-shape formation. They tend to look at the top, they
4 tend to look down the right-hand side, and they tend to look
5 sort of at the dead center of the page that they're looking
6 at.

7 And if the FTC is aware of this and they're able to put it
8 out in a public report, I think it's fair to say that any
9 retailer in this business knows that, too. So I think the
10 disclosure is simply not close enough to what it's describing
11 and purposely put it in an inconspicuous place.

12 I think also another flaw with these pages is that, in the
13 order summary that keeps appearing in the upper right-hand
14 corner, the cost of the Identity Protect trial is listed over
15 and over again as zero. And, again, that tells somebody that
16 they are getting something for free. Again, cancel any time
17 after your trial, you'll be billed \$19.95 a month. I think
18 the ordinary consumer assumes that that means I have to take
19 steps to use this after the seven-day period.

20 And that carries through to the next step, Step 5, and it
21 carries through, you know, to the final step they've listed
22 here for the order summary, where you would actually then
23 enter your billing information and confirm the purchase.

24 And there's an additional step that -- well, again, then
25 there's Step 7, too. Again, when it provides the summary,

1 the order summary, the cost of the Identity Protect trial is
2 listed as zero.

3 In a previous exhibit that Intelius submitted to the
4 court, I believe there was an additional step that showed the
5 kind of follow-up confirmation that Intelius would send to
6 somebody about their purchases, and there, again, the cost of
7 Identity Protect was listed as zero. And that was Step 8 in
8 Ronald Thunen's exhibit. I think it was Exhibit B that was
9 submitted with the Rule 12(b) motion in January of last year.

10 I had a number of points I wanted to make.

11 THE COURT: I took some of the steam out of your
12 presentation. Sorry.

13 MS. NUGENT: That's okay. I wanted to backtrack and
14 go over a few things that I think are relevant and should be
15 dispositive here.

16 We did talk about, in our brief, the idea that the
17 *VistaPrint* and *Baxter* courts took a fairly rigid approach to
18 deciding what consumers should and shouldn't do when they're
19 on the Internet. And, Your Honor, you said it yourself, that
20 the expectation that could be drawn from those opinions is
21 you're supposed to be scrutinizing it like it's a contract.
22 I think it's important to remember that it's actually
23 supposed to be an offer. It's presumably an ad asking
24 somebody to buy something, and so that level of scrutiny
25 seems a bit inappropriate.

1 But the other thing that is really significant here is
2 making sure the real world, the way people actually operate,
3 is a part of the standard and a part of the way these cases
4 are designed. The FTC has put forth quite a bit of guidance
5 in their dot com disclosure statements, I think for ten years
6 now, telling the retailers that they have to make sure the
7 disclosures are clear and conspicuous, and that simply
8 putting them someplace on a page is not enough, that it's not
9 enough that somebody could find them. You have to place them
10 where somebody will, in fact, find them.

11 I think one thing that we talked about here as well is
12 that, typically, in a very early stage of the case, the court
13 is forced to determine whether or not somebody is or is not a
14 reasonable consumer, using guidance available from case law
15 or other sources. But at this point in this litigation, some
16 actual evidence has been developing, and some of it is laid
17 out in the Attorney General's complaint that we submitted.

18 The Attorney General had said that thousands of complaints
19 had been received by his office and the Better Business
20 Bureau and that thousands more had been received by Intelius
21 itself.

22 The Attorney General was also able to get statistics
23 showing how people were actually viewing the ads, and some of
24 those statistics were that 50 percent of the customers were
25 spending less than 30 pages [sic] looking at these pop-up

1 ads.

2 THE COURT: You said, "less than 30 pages."

3 MS. NUGENT: Sorry. Less than 30 seconds, which,
4 given the density of the text and perplexity of some of the
5 information being conveyed, is clearly not enough time.
6 Using data that I presume came from Intelius itself, that 100
7 percent of the customers were going through those pop-ups in
8 less than 60 seconds. So, again, I think that that
9 demonstrates the point that you were making earlier about how
10 people do tend to move from screen to screen. They don't
11 expect to have to read everything and scrutinize it as though
12 it were a contract.

13 I think the last piece of information that's been
14 developed so far, and through the Attorney General's
15 investigation, goes to the usage rates. Mr. Harrigan was
16 trying to distinguish this case from the *Cyberspace* case,
17 pointing out the numerator and denominator, how many people
18 received the ad and how many people actually did something
19 with it.

20 I think we have something comparable here. The Attorney
21 General provided, at least, some of the usage statistics for
22 the programs offered here, and the Attorney General found
23 that they were below seven percent. So of the 100 people who
24 were signed up for something, only seven made any indication
25 that they were aware of it and even used it, and that's a

1 pretty compelling number.

2 THE COURT: Great. Thanks very much, counsel.

3 Mr. Harrigan, looking at your Tab C again on the
4 Bebbington issue, the order summary says, "Cancel any time.
5 After your trial, you will be billed \$19.95 per month."
6 You're not billed \$19.95 a month, you're charged \$19.95 a
7 month.

8 MR. HARRIGAN: That's correct.

9 THE COURT: And in other parts, when the charge is
10 being put on a credit card, it is charged. Is that, "You
11 will be billed," deceptive?

12 MR. HARRIGAN: Well, Your Honor, I don't think so,
13 particularly in view of the language right under there, "Your
14 credit card will be billed \$19.95, plus tax where
15 applicable." And then over on the left-hand side, it says,
16 "The membership fee of \$19.95 will be charged and debited by
17 Intelius to the credit card." I mean, I guess you can
18 question whether the word "billed" is a really good word to
19 use instead of "charged," but the way it's used here, if
20 anybody looked at any of the other warnings, it's clear that
21 they mean the same thing.

22 THE COURT: Okay.

23 MR. HARRIGAN: A couple of points, Your Honor, with
24 regard to the usage issue, with respect to Identity Protect,
25 at least.

1 It is a largely passive product. Basically, Intelius
2 watches out for indications in the -- out there in
3 cyberspace, for things like telephone number changes and so
4 forth that are sometimes going on when your identity is being
5 stolen, and sends you an alert. But -- and you get insurance
6 and, you know, you get discounts on Intelius products. But
7 it's not like an Internet service provider where, if you're
8 not logging on it, you're not using it. It's kind of like
9 saying you're not using your insurance policy. So I don't
10 think those numbers mean very much.

11 And I would say with regard to the Adaptive ad and the
12 issue of duration of use, I really that think if someone
13 spent 30 seconds looking at that Adaptive page, it would be
14 possibly difficult not to figure out what was going on there.

15 THE COURT: But you're brilliant.

16 MR. HARRIGAN: Not when I'm using a computer, Your
17 Honor.

18 THE COURT: Okay. Thank you. I appreciate it.

19 MS. NUGENT: Your Honor?

20 THE COURT: Yes, go ahead.

21 MS. NUGENT: There's one thing I wanted to add.

22 THE COURT: Sure. You didn't take much time.

23 MS. NUGENT: It goes, again, to the allegations of
24 the complaint being borne out by the evidence that's being
25 developed, which I know is not necessarily to be considered

1 on this Rule 12 motion. But we did submit to the court,
2 earlier this week, a declaration and some documents that we
3 had obtained from Shelli Strand, who was the consultant that
4 Intelius hired back in 2008 to advise them on how to make
5 their website -- well, to review their website and tell them
6 whether or not it was confusing, and if it were confusing,
7 how to fix it. And the Strand report, which was appended to
8 Karin Swope's declaration filed earlier this week, goes to
9 recommendations that mirror the allegations that we made in
10 the complaint and the arguments we made in the papers about
11 the appearance, the lack of clarity in terms of who you're
12 dealing with when they are third-party ads, the lack of a
13 clear decline option, the need to actually streamline the
14 text because it's so dense that people can't actually pull
15 out the truly essential and material information that they
16 should be getting. So I just wanted to bring that to the
17 court's attention.

18 THE COURT: Okay. Thank you.

19 I think that it's clear that Intelius' responsibility is
20 not to come up with the perfect way to phrase things so that
21 no one was ever misled, confused, or whatever. That's not
22 the standard here. And the fact they are trying to
23 improve -- in general, in the law, we don't hold it against
24 companies or entities when they try to make things better, to
25 say, well, it was lousy to begin with. So I'm mindful of all

2 And Mr. Harrigan is a wonderful oral advocate, and he has
3 pointed the court's attention to things that definitely need
4 to be considered out of fairness to the defendant here, too.
5 So I want to look very closely at the situation. It may well
6 be that the court will allow some of the case to go forward
7 but not all of the case, some of the plaintiffs but not all
8 of the plaintiffs, some of the claims but not all of the
9 claims.

10 I do want to take a little bit of time after the
11 presentation to parse exactly what that's going to be, and I
12 will get a decision out to you hopefully by the early part of
13 next week, so we don't have very long to wait on what's going
14 forward here. I think that it is timely for the court to
15 hear the case. I know there was some discussion about
16 whether it was premature. It's not premature.

17 I will address the Stored Communications Act, the
18 individual plaintiff's claims, and whether the Lee case can
19 have a Washington State CPA claim. So you'll have fairly
20 clear guidance in all those areas.

21 Thanks very much for the excellent briefing and
22 presentation today. We'll be adjourned.

24 (THE PROCEEDINGS CONCLUDED.)

25

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 9th day of February 2011.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter